United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 22, 2015

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Ashford TRS Nickel, LLC 177-1642
Case 19-CA-147032 177-1650

The Region submitted this case for advice as to whether Ashford TRS Nickel, LLC ("Ashford") and its affiliated entities that own the Sheraton Anchorage Hotel ("Hotel"), are a single and/or joint employer with Remington Lodging & Hospitality, LLC ("Remington") that contracts with Ashford to manage the Hotel. We agree with the Region that Ashford and Remington are a single employer. We also conclude in the alternative that Ashford and Remington are joint employers of the Hotel employees under the Board's recent decision in *Browning Ferris*.[1]

FACTS

Ashford and its related entities invest in the ownership of hotels.[2] Remington operates a majority of Ashford's hotel properties, including the Hotel. Ashford, AHT, and Remington are headquartered in the same Dallas, Texas office building (albeit in different suites). Remington is privately held and 100 percent owned by Archie and Monty Bennett. Each Bennett owns a 2.3 percent interest in AHT and serves on its board of directors. In addition, Archie Bennett is the Chairman of Remington and the Chairman Emeritus of AHT; Monty Bennett is the CEO of Remington and the CEO and chairman of AHT.

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[1] *BFI Newby Island Recyclery*, 362 NLRB No. 186 (August 27, 2015).

[2] Ashford TRS Nickel is a subsidiary of Ashford Hospitality Trust, Inc. ("AHT"). AHT stipulated in a prior proceeding in another case, described infra, that it is a single integrated enterprise and a single employer with its affiliated entities, including Ashford TRS Nickel (but excluding Remington). *See Ashford TRS Nickel LLC*, (JD(SF)-55-13), slip op. at 2 n.1 (November 18, 2013) (currently pending before the Board).

Remington and Ashford co-determine labor relations at the Hotel. Specifically, Remington's management of the Hotel is governed by a Hotel Master Management Agreement ("Agreement") that identifies Remington as the entity that "will hire, train, promote, supervise, direct the work of and discharge" Hotel employees but provides Ashford with the authority to control wages and other terms and conditions of employment. For example, the Agreement permits Remington "to fix the employees' terms of compensation and establish and maintain all policies relating to employment, so long as they are reasonable and in accordance with the Applicable Standards and the Annual Operating Budget." The Agreement requires Remington to not only submit to Ashford its Annual Operating Budget for approval, but regularly consult with Ashford on "matters of policy concerning management … wage scales, personnel, general overall operating procedures, economics and operation and other matters affecting the operation of the Hotel[]." Further, the Agreement provides that employer contributions to employee benefit plans and administrative fees "shall be the responsibility of [Ashford] and shall be a Deduction."

Indeed, Ashford and Remington share legal counsel for Union matters because, as described by Ashford's legal counsel, the companies are "dealing with one hotel as to which [Ashford] is the owner, Remington is the management company."[3] Ashford and Remington also acknowledge their mutual interest related to their common opponent, the Union.[4] One shared legal decision involved Ashford's filing and maintenance of a federal court lawsuit against the Union for boycotting the Hotel.[5] Monty Bennett, Ashford's and Remington's CEO, decided to file the lawsuit on behalf of Plaintiff "Hotel" and/or "Sheraton Anchorage," without distinguishing Ashford from Remington.[6] An ALJ decided that Ashford's lawsuit against the Union violated Section 8(a)(1), for which Ashford could be liable, even though it was not the immediate "employer" of the Hotel employees.[7] The ALJ's decision is currently before the Board.

Finally, Ashford, through AHT, admits that it and Remington lack an arm's-length relationship. Thus, AHT's 10-K Annual Report form filed with the SEC in 2014

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[3] *Ashford TRS Nickel LLC*, (JD(SF)-55-13), slip op. at 5.

[4] *See id.*, slip op. at 4-5.

[5] *See generally Ashford TRS Nickel LLC*, (JD(SF)-55-13).

[6] *See id.*, slip op. at 5.

[7] *See id.*, slip op. at 8-9.

acknowledged that the Agreement with Remington was "not negotiated on an arm's-length basis" and AHT "did not have the benefit of arm's-length negotiations of the type normally conducted with an unaffiliated third party" in part because "our chief executive officer and chairman of our board has an ownership interest in Remington[.]" AHT admits that its mutual exclusivity agreement with Remington required it to engage Remington to manage its hotels absent a contrary directors' vote and that it "may choose not to enforce, or to enforce less vigorously, [its] rights under these agreements because of [its] desire to maintain [its] ongoing relationship with … Remington Lodging." AHT's 10-K form reiterated that "[c]onflicts of interest in general and specifically relating to Remington Lodging may lead to management decisions that are not in the stockholders' best interest."

UNITE HERE! Local 878 ("the Union") represents the Hotel employees. Remington and the Union began bargaining for a successor contract in 2009 but have been unsuccessful at reaching an agreement largely because of Remington's extensive unlawful conduct.[8]

ACTION

We agree with the Region that Ashford and Remington are a single employer. We conclude also in the alternative that Ashford and Remington are joint employers of the Hotel employees under the Board's recent decision in *Browning Ferris*.[9]

I. Ashford and Remington are a single employer

The Board "considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise[.]"[10] In determining single employer status, the Board and courts consider four factors: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of

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[8] *See, e.g.*, *Remington Lodging & Hospitality, LLC d/b/a The Sheraton Anchorage*, 362 NLRB No. 123 (June 18, 2015) ("Remington I"); *The Sheraton Anchorage*, 363 NLRB No. 6 (September 15, 2015) ("Remington II"); *Ashford TRS Nickel LLC*, (JD(SF)-55-13).

[9] 362 NLRB No. 186 (August 27, 2015).

[10] *Radio and Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965). *See also Mercy Hosp. of Buffalo*, 336 NLRB 1282, 1283-84 (2001).

labor relations.[11] Significantly, single employer status is characterized by the absence of an arm's-length relationship.[12] And, while no single factor is controlling,[13] the Board stresses the latter three factors, and places particular emphasis on common control of labor relations.[14] In this regard, the Board does not require that common officials directly oversee the workforces of both entities. Rather, "it is only necessary to conclude that there had been an ability by one entity to exercise 'clout' over labor relations of others."[15]

We agree that Ashford and Remington are a single employer. Although there is no common ownership because of the Bennetts' minority stake in AHT, the other three indicia of single employer status are present. Thus, there exists common management at the top levels of the two companies: Monty Bennett is the CEO of both Ashford and Remington while Archie Bennett is the Chairman Emeritus of AHT and the Chairman of Remington.[16] There is also evidence that the companies' operations are interrelated. Ashford and Remington are located at the same address

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[11] *See e.g., Dow Chem. Co.*, 326 NLRB 288, 288 (1998) (citing *Radio Union*, 380 U.S. at 256); *Emsing's Supermarket*, 284 NLRB 302, 302 (1987), *enforced* 872 F.2d 1279 (7th Cir. 1989).

[12] *See Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 (April 8, 2015); *Emsing's Supermarket*, 284 NLRB at 302. *See also Lebanite Corp.*, 346 NLRB 748, 748 n.5 (2006).

[13] *See, e.g.*, *Central Mack Sales*, 273 NLRB 1268, 1271-72 (1984); *Blumenfeld Theatres*, 240 NLRB 206, 215 (1979), *enforced* 626 F.2d 865 (9th Cir. 1980).

[14] *See, e.g.*, *Hydrolines, Inc.*, 305 NLRB 416, 417 (1991); *Geo. V. Hamilton Inc.*, 289 NLRB 1335, 1337 (1988); *Fedco Freightlines, Inc.*, 273 NLRB 399, 399 n.1 (1984).

[15] *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 5 (citing *Pathology Institute*, 320 NLRB 1050, 1064 (1996), *enforced sub nom. Alpha Bates Corp. v. NLRB*, 116 F.3d 482 (9th Cir. 1997)); *Emsing's Supermarket*, 284 NLRB at 302 ("the fundamental inquiry is whether there exists overall control of critical matters at the policy level[]").

[16] *See, e.g., Royal Typewriter Co.*, 209 NLRB 1006, 1007-10 (1974) (common high level management among parent company and subsidiary), *enforced* 533 F.2d 1030 (8th Cir. 1976); *Soule Glass and Glazing Co.*, 246 NLRB 792, 795 (1979) ("flow of common management personnel from one corporation to the other" supported single employer finding), *enforced in pertinent part* 652 F.2d 1055, 1075 (1st Cir. 1981). *See also Sakrete of N. Cal., Inc. v. NLRB*, 332 F.2d 902, 906-907 (9th Cir. 1964) (single employer finding not precluded where common management only found at top level).

and hold themselves out as one integrated company as plaintiffs in their joint lawsuit against the Union. Indeed, AHT's candid acknowledgment to the SEC that it lacks an arm's-length relationship with Remington exemplifies the companies' single employer relationship. Finally, the Agreement between Ashford and Remington provides Ashford with obvious control over Remington's labor relations by requiring Remington to submit its Annual Operating Budget to Ashford for approval and to routinely consult with Ashford on matters concerning "management … wage scales, personnel, general overall operating procedures, economics and operation and other matters affecting the operation of the Hotel[]." We agree that this evidence, in total, establishes that Ashford and Remington are a single employer.

II. Ashford and Remington are joint employers of the Hotel employees

The Region should also allege in the alternative that Ashford and Remington are joint employers. The Board recently reaffirmed the principle that two or more statutory employers are joint employers of the same employees if they are "both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."[17] In *Browning Ferris*, two statutory employers were found to be joint employers of a single workforce where they had an agreement in which the supplier employer recruited, selected, and hired employees for the user employer that could, in turn, reject and discharge employees and exert control over employees' wages, work shifts, and productivity and safety standards.[18] The Board concluded that the user and supplier were joint employers based on their joint control of employees and employees' terms and conditions of employment, even though the entities' agreement specified that the supplier entity was the sole employer of the employees.[19] The *Browning Ferris* Board noted that the Board will no longer require that a joint employer both *possess* the authority to control employees' terms and conditions of employment and *exercise* that authority directly, immediately, and "not in a 'limited and routine' manner."[20] Rather, joint employer status is determined by the *right* to control in the common-law sense, i.e., whether an employer can "affect[] the means or manner of employees' work and terms of employment, either directly or through an intermediary."[21]

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[17] *Browning Ferris*, 362 NLRB No. 186, slip op. at 15.

[18] *See id.*, slip op. at 3-6.

[19] *See id.*, slip op. at 3, 18-20.

[20] *Id.*, slip op. at 15-16 (overruling Board decisions, including *TLI, Inc.*, 271 NLRB 798 (1984), *enforced mem. sub nom. Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985); *Laerco Transp.*, 269 NLRB 324 (1984)).

Here, although the companies' Agreement allocates to Remington the responsibility to hire, direct, and discharge employees, it also affords Ashford the right to reject or discharge employees and to control their wages, benefits, and other terms and conditions of employment by approving—or not— Remington's Annual Operating Budget. Indeed, Remington is required to regularly consult with Ashford on these and other issues. This evidence amply demonstrates that Ashford and Remington "share [and] codetermine those matters governing the essential terms and conditions of employment" for the Hotel employees and that they are thus joint employers.[22]

Accordingly, the Region should allege, absent settlement, that Ashford and Remington are a single employer and, also, are joint employers of the Hotel employees.

/s/
B.J.K.

H: ADV. 19-CA-147032.Response.Ashford.(b) (6), (b)

[21] *Id.*, slip op. at 16.

[22] *Id.*, slip op. at 15.

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 13, 2017

TO: David Cohen, Acting Regional Director
Region 12

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Telemundo Television Studios, LLC
Case 12-CA-186493

177-2414-0100-0000
177-1650-0100-0000
512-5006-5053-0000
512-5012-0100-0000
512-5072-0100-0000

The Region resubmitted this case for advice as to whether the Employer violated Section 8(a)(1) of the Act by misclassifying performers in its Spanish-language soap operas as independent contractors under the General Counsel's theory in *Pacific 9 Transportation, Inc.*,[1] after conducting additional investigation pursuant to an Advice Memorandum dated April 5, 2017. We agree with the Region that the performers are employees, and we conclude that the evidence demonstrates that the Employer is derivatively liable, as a joint employer with its performers' talent managers, for misclassifying its performers. Therefore, the Region should solicit an amended charge from the Union naming as a joint employer any talent manager that has misclassified one or more of the Employer's performers as an independent contractor. The Region should process the amended charge and issue complaint, absent settlement, against the Employer and any talent manager whose agreement with one of the Employer's performers misclassifies the performer as an independent contractor during the 10(b) period.

FACTS

A. Background

Performers[2] for NBCUniversal's English-language dramatic scripted programming are represented by the Screen Actors Guild – American Federation of

[1] Case 21-CA-150875, Significant Advice Memorandum dated Dec. 18, 2015.

[2] We use the term "performers" to mean actors and other classifications in Union-represented bargaining units.

Television and Radio Artists (Union). These performers are employed by production companies as employees. Many also have talent agents that help them procure jobs. According to the Union, this structure is uniform among signatories to its collective-bargaining agreement.

NBCUniversal acquired Telemundo Television Studios, LLC (Employer) in 2001. At that time, the Employer began producing scripted dramatic Spanish-language programming, including Spanish-language soap operas known as telenovelas, at studio facilities in Miami, Florida. The work was performed non-Union, and, as described in more detail below, almost all of the performers have been employed through intermediary entities called "talent managers."[3]

In early 2016,[4] the Employer's performers began organizing with the Union. The Union initially requested that the Employer voluntarily recognize the Union. The Employer refused to do so and communicated to its performers that it believed that they should be able to vote in an NLRB election. Employer representatives also held an anti-Union meeting with the cast of one of its productions.

Subsequently, the Union continued its organizing campaign, which included publicizing the different working conditions of performers with English-language roles versus Spanish-language roles in the United States. In October, the Union filed the charge in the instant case, alleging that the Employer had unlawfully misclassified its performers as independent contractors.

In December, the Union filed a petition to represent the Employer's performers. The Employer challenged the appropriateness of the unit but stipulated that all of the individuals in the petitioned-for unit were the Employer's statutory employees. However, the stipulation specifically stated that it would have "no force or effect" in the instant case. The Region's Decision and Direction of Election found a unit including the Employer's main cast actors, guest actors, day players,[5] singers, dancers, and stunt persons to be appropriate and set an election for February 2017.

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[3] It appears that the term "talent manager" is used interchangeably with the term "talent agency."

[4] All subsequent dates are in 2016 until otherwise noted.

[5] Day players are also known as "figurantes."

After the Decision and Direction of Election, the Employer urged its performers to vote no. The Union filed unfair labor practice charges alleging that the Employer maintained an unlawful confidentiality rule and an unlawful rule prohibiting disparagement. The Region found merit to these allegations and issued a complaint.[6] The Region is still investigating the Union's allegation that the Employer has maintained a variety of other unlawful rules.[7]

On March 8, 2017, the Union won the election by just over 80%. The Union and the Employer held their first bargaining session on May 23, 2017, and are scheduled to bargain again on June 13, 2017.

B. The Employer's Employment Structure

The Employer exercises significant control over the working conditions of all of the performers in the bargaining unit. However, it directly employs only a small percentage of its main cast actors.[8] The Employer employs and compensates its remaining performers through agreements with their talent managers.

1. The Employer's Relationship With Talent Managers

The Employer's contracts with talent managers state that the talent manager will provide the Employer with personnel to perform for its telenovela projects. The Employer requires talent managers that provide guest actors and day players to agree to a Personnel Services Agreement (PSA). The PSA provides that the talent manager has the right to "direct, control and supervise" the performers supplied. However, this direction, control, and supervision must be consistent with the Employer's instructions or requirements and, in the event of a disagreement, the Employer's decision will be final. The PSA also requires that if the talent

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[6] Case12-CA-189102. The trial for this case is scheduled for September 18, 2017. The Employer, in its answer to the complaint, did not deny its employer status, but it did state that the alleged unlawful rules apply to employees and independent contractors.

[7] Case12-CA-197287.

[8] These actors are directly employed either through an exclusive contract or a Specific Project Services Agreement. The lists of performers provided by the Employer during the Representation Case proceeding (Exhibit 9E & the Voter List), herein referred to as "the performer list," indicate that the Employer directly employs approximately 8 of the 151 bargaining unit employees.

manager has more than four performers scheduled to work for a telenovela project for any one day, the talent manager will ensure that a coordinator is present, either on location or in the studio, to facilitate performers' management and supervision. The PSA also requires the talent manager to have a valid and binding written agreement with the performer, pursuant to which the talent manager has the right to provide the performer's services to the Employer.

The PSA also provides that the Employer will pay the talent manager a fee for the services provided by the supplied performer, and requires the talent manager to compensate the performer in conformance with all applicable state and/or federal wage and hour laws. The PSA includes a chart of various daily billing project rates, including six levels for guest actors and three levels for day players. The PSA also requires the talent manager to "cause [the performer(s)] to maintain his/her appearance as may be necessary to maintain continuity in the Picture." The Employer asserts in its January 2017 position statement that "these [talent managers] set all working terms and conditions for [day players and extras]."[9]

To obtain the services of certain main cast actors and certain guest actors, the Employer utilizes a "loan-out" agreement, under which the talent manager similarly agrees to provide the services of the "Artist," rather than a PSA. This loan-out agreement requires that the talent manager discharge the Employer of all obligations imposed on employers, including the payment of the actor's compensation; the withholding and payment of federal, state, and local taxes; payments relating to unemployment compensation or insurance; and worker's compensation.[10] The Employer asserts that it only engages performers through a loan-out agreement at the performer's request, though performers dispute this.

In June 2013, the Employer sent a letter to all talent managers stating that to do business with the Employer, they must: (1) be licensed as a "talent agency" in the state of Florida; (2) carry liability insurance with the Employer as an additional "Insured and Certificate Holder"; and (3) provide workers' compensation coverage for all talent represented. The letter stated that talent managers had

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[9] Extras are not in the bargaining unit and not at issue in the instant case.

[10] Additionally, in 2010 and 2013, these loan-out agreements had provisions stating that "no employment relationship between Artist and [Employer] is created by this Agreement." The Employer's more recent loan-out agreements do not have this language.

approximately sixty days to provide the Employer with proof of license and a domestic certificate of liability insurance.

2. <u>The Talent Managers' Relationship With Performers</u>

Talent managers have either written or verbal agreements with performers. Talent managers are involved with the Employer's hiring of a performer for a specific role in a telenovela project based on the Employer's needs, and in negotiating and determining the performer's pay. Once a performer's role and pay are determined, the talent manager instructs the performer regarding the time frame and schedule for production, provides initial scripts, and communicates other instructions from the Employer. As noted above, talent managers are responsible for receiving payment from the Employer for the performer's services, and then directly paying the performer. The talent managers utilized for the Employer's productions generally deduct a fee of 20% or 30% from the performer's compensation.[11] At least some talent managers provide performers with a 1099 tax form.

Talent managers also help to resolve issues that arise during production. The Employer's (b) (6), (b) (7)(C) testified during the Representation Case Proceeding that if day players, singers, dancers, or stunt persons violate the Employer's policies, (b) (6), (b) (will "talk to the [talent manager] . . . and say hey, we have this case where this person that is under your care violated this policy and I need you to take action in order to remedy it or we may ban this person from ever coming to the studios again."[12] (b) (6), (b) (7 further stated that if a main cast actor violated one of the Employer's policies, (b) (6), (b) (7) would conduct an investigation, including having a conversation with both the actor and, if the actor is represented, with their talent manager.[13]

Performers also have described their talent manager's role in helping to resolve issues arising during production. One performer states that if (b) (6), (b) (7) is asked to work beyond twelve hours, (b) (6), (b) (7 needs to call (b) (6), (b) (7) talent manager, who will then call the Employer to attempt to resolve the issue. Another performer states that

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[11] The Union asserts that the standard commission for a traditional talent agent in the industry is 10%.

[12] Tr. 459.

[13] Tr. 459-60.

talent manager assisted in getting time off to attend an out-of-town event. talent manager also assisted in gaining access to a trailer when had to wait around before filming began. Another performer states that has asked talent manager to inform the Employer that was running late. Talent managers also tell performers when they have to appear on one of the Employer's talk shows for an interview or attend a "wrap party."

The agreements between talent managers and actors also contain language about the employment status of the actors. The following summarizes the agreements currently in the investigative file:[14]

- A written contract between a performer and talent manager Palomera, effective 2016 through 2019, states that "[i]t is expressly understood that you are an independent contractor and not an employee."[15]

- A written contract between a performer and talent manager S.K. Ripstein, Inc., effective dates unknown, states: "[i]t is expressly understood that I am an independent contractor and not an employee."[16]

- A written contract between a performer and talent manager Century Entertainment, effective October 1, 2013, end date unknown, states that it is understood between the parties that the relation between the artist and representative will always be independent contractor and not employee.[17]

- A written contract between a performer and talent manager Ale Star Inc., effective 2012, end date unknown, states that "there is no implication of subordination/dependence because

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[14] In addition to the talent managers listed below, the performer lists indicate that a number of performers have relationships with talent managers such as High Hill, and others.

[15] The performer lists indicate that approximately five other employees in the unit have contracts with Palomera.

[16] It is unclear how many performers have contracts with S.K. Ripstein, Inc.

[17] The performer lists indicate that approximately seven other employees in the unit have contracts with Century Entertainment.

there is no labor relationship."[18]

- A written contract between a performer and talent manager BoboProductions/(b) (6), (b) (7)(C) effective August 6, 2015 through August 6, 2018, states that "the contracting parties agree that the representative will not be the employer either directly or indirectly."[19]

- A written contract between a performer and talent manager (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) Jorvi/Moran Vidal, effective September 27, 2011, end date unknown, states that "the artist and representative recognize and accept that the present contract . . . is not a relationship of work between the parties."[20]

- Affidavit evidence indicates that a performer has a verbal contract with talent manager Star Talent; that Star Talent gives (b) (6), (b) (7) a 1099 tax form; and that (b) (6), (b) understands that (b) (6), (b) is an independent contractor.[21]

ACTION

We agree with the Region that the performers are employees and we conclude that the evidence demonstrates that the Employer is derivatively liable, as a joint employer with its performers' talent managers, for misclassifying performers as independent contractors. Therefore, the Region should solicit an amended charge from the Union naming as a joint employer any talent manager that has misclassified one or more of the Employer's performers as an independent contractor. The Region should process the amended charge and issue complaint, absent settlement, against the Employer and any talent manager whose agreement with one of the Employer's performer misclassifies the performer as an independent contractor during the 10(b) period.

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[18] The performer lists indicate that approximately six other employees in the unit have contracts with (b) (6), (b) (7)(C) Ale Star Inc.

[19] The performer lists indicate that approximately six other employees in the unit have contracts with BoboProductions (b) (6), (b) (7)(C)

[20] The performer lists indicate that approximately four other employees in the unit have contracts with BoboProductions/(b) (6), (b) (7)(C)

[21] The performer lists indicate that approximately sixteen other employees in the unit have contracts with Star Talent.

A. The Employer and Talent Managers are Joint Employers of the Performers

Initially, we agree with the Region that the Employer's performers are statutory employees rather than independent contractors, as the vast majority of the common-law factors and the independent business factor weigh in favor of employee status.[22] We also conclude that the Employer and the performers' talent managers are joint employers. In *BFI Newby Island Recyclery*, the Board reaffirmed that two or more employers are joint employers of the same employees if (1) they are "both employers [of a single workforce] within the meaning of the common law" and (2) they "share or codetermine those matters governing the [employees'] essential terms and conditions of employment."[23] The Board further explained, inter alia, that there are various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, such as conferring or collaborating directly to set a term of employment; exercising comprehensive authority over different terms and conditions of employment; affecting different components of the same term; or retaining the contractual right to set a term or condition of employment.[24]

Here, the Employer has already stipulated in the representation case that it is an employer with respect to the performers in the bargaining unit, who are statutory employees.[25] Further, the evidence overwhelmingly demonstrates that the talent managers are joint employers of the performers in their work for the Employer. The talent managers, among other things, sign agreements with the Employer to provide personnel and are the employer of record for the performers in their work for the Employer; recruit and hire the performers to perform work for the Employer; negotiate and co-determine compensation; determine the employment status of the performers and how much compensation to withhold for

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[22] *See, e.g., FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 2, 11 (Sept. 30, 2014), *enforcement denied*, 849 F.3d 1123 (D.C. Cir. 2017).

[23] 362 NLRB No. 186, slip op. at 15 (Aug. 27, 2015).

[24] *Id.*, slip op. at 15 & n.80.

[25] We note also that the Employer has stipulated that it is an employer engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act and is subject to the jurisdiction of the Board. It is well established that the commerce data of joint or single employers may appropriately be combined for jurisdictional purposes. *See, e.g., 373-381 South Broadway Associates*, 304 NLRB 1108, 1108 (1991).

its service fee, as well as for taxes and other costs; purchase liability and workers' compensation insurance to cover the performers in their work for the Employer; provide performers with initial scripts and schedules; are responsible for ensuring that the performers maintain their appearance; have a contractual right to direct, control, and supervise the performers within the limits set by the Employer; are required to provide a coordinator to assist the Employer with management and supervision if they are providing more than four performers to work on a telenovela project for any one day; and are involved in problem solving when issues arise on the job. Thus, the talent managers are employers within the meaning of the common law[26] and have a significant and meaningful role in co-determining and affecting the performers' terms and conditions of employment.[27]

B. Talent Managers Violated Section 8(a)(1) By Misclassifying the Performers as Independent Contractors

Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of employees' Section 7 rights. Although the Board has never held that an employer's misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1), several lines of Board decisions support such a finding. Specifically, the Board has held that the following violate the Act: (1) an employer's actions that preemptively strike at employees' ability to exercise their Section 7 rights;[28] (2) an employer's statements to employees

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[26] In the words of the *Restatement (Second) of Agency*, § 220(1), the performers are "employed to perform services in the affairs" of the talent managers and, "with respect to the physical conduct in the performance of the services," are "subject to [the talent managers'] control or right to control." *See, e.g., Retro Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70, slip op. at 3 & n.4, 4 (Aug. 16, 2016) (concluding that supplier company that primarily hired, fired, and assigned employees to project sites was an employer within the meaning of the common law).

[27] Compare *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1122 (2002) (rejecting argument that putative employer was a joint employer, where it provided merely administrative payroll services), *affirmed mem.*, 71 F. App'x 441 (5th Cir. 2003), *with Capitol EMI Music*, 311 NLRB 997, 998 n.7, 1017 (1993) (supplier of temporary employees that negotiated their wage rates was a joint employer), *enforced per curiam*, 23 F.3d 399 (4th Cir. 1994).

[28] *See, e.g.*, *Parexel International, LLC*, 356 NLRB 516, 518-19 (2011) (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees).

that engaging in Section 7 activity would be futile;[29] and (3) misstatements of law that reasonably insinuate adverse consequences for engaging in Section 7 activity.[30] Based on the foregoing principles, the Division of Advice concluded in *Pacific 9 Transportation*,[31] *Liberty Transportation Group*,[32] *Menard, Inc.*,[33] and *SOS International LLC*,[34] that employers violated Section 8(a)(1) by misclassifying their employees as independent contractors.

In the instant case, despite the performers' status as statutory employees, the evidence demonstrates that at least some of their talent managers have misclassified them as independent contractors in violation of Section 8(a)(1) under the *Pacific-9* theory articulated above. Specifically, Palomera, S.K. Ripstein, Inc., (b) (6), (b) (7)(C) Century Entertainment, (b) (6), (b) (7)(C) Ale Star Inc., BoboProductions/(b) (6), (b) (7)(C) Jorvi/Moran Vidal, and Star Talent have effectively communicated to the Employer's employees that they are independent contractors through written or verbal contracts and/or the provision of 1099 tax forms. This misclassification has and will operate as a restraint on, and

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[29] *See, e.g.*, *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, slip op. at 1 (Dec. 16, 2014) (concluding that employer's statement that employees' grievance would go nowhere constituted unlawful threat of futility); *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (employer's statement that collective bargaining would not result in employees obtaining benefits other than what employer chose to give them and unionization would lead employer to choose to give them less violated Section 8(a)(1) because employees "could reasonably infer futility of union representation").

[30] *See, e.g.*, *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617-18 & n.22 (2007) (employer's flyer that misled employees by creating impression that employees would have to give up customary wage increases as a "lawful and ineluctable consequence" of collective bargaining violated Section 8(a)(1)); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 799 n.2 (1980) (misstating law by implying that union would have right to demand that employees pay union fines and assessments and accede to contractual dues checkoff to retain their jobs was unlawful in context of other threats), *enforced mem.*, 679 F.2d 900 (9th Cir. 1982).

[31] Case 21-CA-150875, Advice Memorandum dated Dec. 18, 2015.

[32] Case 06-CA-162363, Advice Memorandum dated July 22, 2016.

[33] Case 18-CA-181821, Advice Memorandum dated Dec. 2, 2016.

[34] (b) (7)(A)

interference with, the performers' exercise of their Section 7 rights. Also, while the Employer has stipulated to the performers' status as employees for purpose of the representation case, it specifically exempted the instant case from that stipulation. It has also continued to maintain its structure of employing performers through talent managers, at least some of whom continue to classify the performers as independent contractors rather than employees.

C. The Employer and Talent Managers Are Liable as Joint Employers

As a general rule, joint employers are liable for each other's unfair labor practices.[35] In *Ref-Chem Co.*, the Board rejected a joint employer's Section 10(b) defense, explaining that a charge against one of the employers effectively constituted a charge against both of the employers, as "each is responsible for the conduct of the other and whatever unlawful practices are engaged in by the one must be deemed to have been committed by both."[36] The Board has repeatedly reaffirmed this principle of joint liability.[37]

Thus, in the instant case, because the Employer is a joint employer with its talent managers, it is liable for the talent managers misclassifying the performers as independent contractors in violation of Section 8(a)(1). We note that the Board's narrow exclusion from its general rule concerning joint employer liability, as stated in *Capitol EMI Music*, does not apply here because the violation does not depend on a

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[35] *Ref-Chem Co.*, 169 NLRB 376, 380 (1968), *enforcement denied on other grounds*, 418 F.2d 127 (5th Cir. 1969).

[36] *Id.* (manufacturer and its joint employer contractor violated Section 8(a)(5) by unilaterally changing wages and refusing to recognize the union that represented the predecessor contractor's employees).

[37] *See Whitewood Maintenance Co.*, 292 NLRB 1159, 1164 (1989) (joint employer liable for its co-employer's unlawful Section 8(a)(1) statements and interrogation), *enforced*, 928 F.2d 1426 (5th Cir. 1991); *Mar del Plata Condominium*, 282 NLRB 1012, 1012 n.3 (1987) (joint employer liable for co-employer's unlawful Section 8(a)(3) discipline and 8(a)(1) statements); *Windemuller Electric*, 306 NLRB 664, 666 (1992) (joint employer liable for its co-employer's 8(a)(1) violations and discriminatory 8(a)(3) layoffs), *enforced in relevant part*, 34 F.3d 384 (6th Cir. 1994); *Branch International Services*, 313 NLRB 1293, 1300 (1994) (co-employers jointly liable for staffing agency's refusal to remit checked-off dues to union after staffing agency became party to collective-bargaining agreement).

finding of unlawful motive.[38] Additionally, the Union's failure to name the talent managers as joint employers in its petition for representation does not affect the Union's ability to name them in an unfair labor practice charge or the Board's ability to find that they are liable.[39] (b) (5)

(b) (5)

D. Conclusion

Accordingly, the Region should solicit an amended charge from the Union naming as a joint employer any talent manager that has misclassified one or more of the Employer's performers as an independent contractor. The Region should process the amended charge and issue complaint, absent settlement, against the Employer and those talent managers whose agreements with one of the Employer's performers misclassified them as independent contractors during the 10(b) period.[41]

/s/
B.J.K.

ADV.12-CA-186493.Response.TelemundoII (b) (6), (b) (

[38] 311 NLRB at 1001 (rule excusing a joint employer of liability applies only where one employer supplies employees to work in the business of another and the unfair labor practice is dependent on findings of unlawful motive).

[39] *See, e.g., Aldworth Co.*, 338 NLRB 137, 139 (2002) (while union's naming only one employer on its election petition affects the parties' bargaining rights and obligations, the substantive issue of joint employer status and liability for unlawful conduct remains for the Board's determination), *enforced*, 363 F.3d 437 (D.C. Cir. 2004).

[40] For example, if the talent managers assert that they do not co-determine any terms and conditions of employment because they are merely playing an administrative role, or merely following instructions from the Employer, this would directly implicate the Employer for the decision to misclassify the performers as independent contractors.

[41] This includes agreements that were in effect during the 10(b) period, even if they were executed outside the 10(b) period.

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 20, 2016

TO: M. Kathleen McKinney, Regional Director
Region 15

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: H&M Construction Co. & Georgia Pacific, LLC,
as Joint Employers
Case 15-CA-164416

506-0170
506-2001-5000
506-4033-0100
506-6080-0800
512-5012-3317
512-5012-3322
512-5036-0117

The Region submitted this case for advice as to whether the Charging Party, who worked for H&M Construction Co. ("H&M"), engaged in protected concerted activity by posting comments on Facebook regarding how Georgia Pacific, LLC ("GP"), who had contracted out work to H&M, treated its contractors' employees. The Region also requested advice on whether H&M and GP are joint employers, or if GP could be held jointly and severally liable for H&M's unfair labor practices.

We conclude that the Charging Party's Facebook comments constituted concerted activity for mutual aid or protection that did not lose the Act's protection. Thus, H&M violated Section 8(a)(1) by laying [redacted] off for posting those comments. We further conclude that H&M and GP are not joint employers, and that GP is not jointly and severally liable for H&M's unfair labor practice.

FACTS

In August 2010, GP contracted out to H&M the onsite landfill management services for its Alabama River Cellulose ("ARC") paper mill in Perdue Hill, Alabama.[1] H&M and GP have a service agreement outlining H&M's management of the landfill. The agreement requires H&M to maintain qualified personnel at the landfill to

[1] GP also uses other contractors to perform services at the ARC mill.

ensure its continued and smooth operation. It also states that the landfill operator is "responsible for the daily handling of materials and preparation of areas for night-shift hauling Monday through Friday," and that the 24-hour shift crew operator is "responsible for the landfill on weekends." The agreement requires H&M to have a day-shift crew on duty eight hours per day, five days a week, and shift workers operating on two 12-hour shifts, seven days a week. Other than these provisions, the service agreement does not otherwise authorize GP to hire, supervise, discipline, or direct the work of H&M's employees. H&M retains control over its labor policies, including hiring, wages, fringe benefits, discipline, grievances, and daily supervision of employees.

Before late October 2015,[2] the Charging Party worked for H&M as an equipment operator at the ARC landfill. On October 29, the Charging Party saw a sign at the ARC mill announcing a Veterans Day function only for GP's veteran employees, but not for its contractors' veteran employees. The Charging Party mentioned the sign to one of (b) (6), (b) H&M coworkers, who was a former (b) (6), (b) (7)(C) The Charging Party is not a veteran and this coworker was the only H&M employee the Charging Party knew to be a veteran. The coworker responded, "that's bullshit." They did not discuss anything further.

In the following days, GP displayed on its Facebook page posts featuring and praising some of its veteran employees. On November 5, the Charging Party saw on GP's Facebook page a post featuring a veteran employee who worked at a mill near the ARC mill. The Charging Party commented on the post:

> Yeah well I think it's cheesy that at yalls ARC mill in AL y'all are gonna have a little get together for the "mill hand" veterans, but not the in house contractors that work at the mill everyday that are veterans. Yeah that's pretty disgusting if you ask me.

Another commenter (not employed by either H&M or GP) responded: "Remember the famous words of Thumper…." The Charging Party does not know who (b) (6), (b) (7 is or what (b) (6), (b) (7 meant. The Charging Party replied: "Oops well I'm not gonna give special treatment to some veterans just because of where they work. They all deserve equal respect SMFH [shaking my freaking head]." There were no further comments. No one "liked" the comment or any of the replies.

Subsequently, an official in GP's corporate public relations office forwarded the Charging Party's Facebook comments to GP's (b) (6), (b) (7)(C) at the ARC mill. The GP (b) (6), (b) (7)(C) told an H&M Supervisor about the post. The GP (b) (6), (b) (7)(C) and the H&M Supervisor agree that GP did not ask or instruct

[2] All subsequent dates are in 2015.

H&M to take any personnel action against the Charging Party due to the comments.[3] The GP (b) (6), (b) (7)(C) also told the H&M Supervisor that H&M was free to honor any veterans who worked for it at the ARC mill.

The H&M Supervisor then contacted H&M's (b) (6), (b) (7)(C) and told (b) (6), (b) (7) what had happened. The H&M (b) (6), (b) (7)(C) contacted H&M's (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) who determined it would be unwise for the Charging Party to return to the ARC mill and, because there were no openings in the area, that the Charging Party should be laid off. The H&M (b) (6), (b) (7)(C) contacted the H&M Supervisor with the decision and told (b) (6), (b) (7) to relay it to the Charging Party.

On (b) (6), (b) (7)(C) the H&M Supervisor called the Charging Party to (b) (6), (b) office. The Charging Party's Foreman was also present. The H&M Supervisor told the Charging Party that H&M was going to lay (b) (6), (b) (7) off because of (b) (6), (b) Facebook posts. The Charging Party claims that the H&M Supervisor said the order was coming from "higher up," and that GP's (b) (6), (b) (7)(C) wanted the Charging Party discharged, but H&M was going to lay (b) (6), (b) (7) off instead so that (b) (6), (b) could collect unemployment compensation. The Charging Party also asserts that the H&M Supervisor told (b) (6), (b) (7) that (b) (6), (b) was blackballed from every other GP mill. The H&M Supervisor denies making those statements.

In mid-November, the Charging Party filed the current Section 8(a)(1) charge against H&M. During the charge investigation, the Charging Party explained to the Region that (b) (6), (posted the comments because (b) (6), ("was hoping someone would see it and [GP] would change things so everyone could participate" in the Veterans Day function. (b) (6), (b) (also stated that (b) (6), (b) did not know whether other H&M employees ever viewed GP's Facebook page. The Charging Party stated that this was not the only time (b) (6), (b) had observed GP's employees receiving special treatment that H&M's employees did not receive. For example, during mill shutdowns GP has provided its own employees a steak dinner, but not H&M's employees.

ACTION

We conclude that the Charging Party's Facebook comments constituted concerted activity for mutual aid or protection that did not lose the Act's protection. Thus, H&M violated Section 8(a)(1) by laying (b) (6), (b) (7) off for posting those comments. We further conclude that H&M and GP are not joint employers, and that GP is not jointly and severally liable for H&M's unfair labor practice.

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[3] According to the H&M Supervisor, the GP Construction Manager said that GP found the post "upsetting"; however, the GP Construction Manager denies making that statement.

A. The Charging Party's Facebook Comments Constituted Concerted Activity for Mutual Aid or Protection that Did Not Lose the Act's Protection.

Section 7 of the Act provides that employees have the right to engage in "concerted activities" for "mutual aid or protection."[4] Conduct is concerted when it is "engaged in with or on the authority of other employees," or when an individual employee seeks "to initiate or to induce or to prepare for group action" or to bring group complaints to management's attention.[5] The object of inducing group action "need not be express," but instead "may be inferred from the circumstances."[6] Indeed, "it is well established that 'the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much concerted activity as is ordinary group activity.'"[7] Furthermore, "employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted."[8] At the same time, mutual aid or protection "focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'"[9] "[P]roof that an employee action inures to the benefit of all" is "proof that the action comes within the 'mutual aid or protection' clause of Section 7."[10]

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[4] 29 U.S.C. § 157. *See, e.g., Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

[5] *Id.*, slip op. at 3 (quoting *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 885, 887 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)).

[6] *Whittaker Corp.*, 289 NLRB 933, 934 (1988).

[7] *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, slip op. at 3 (citation omitted).

[8] *Whittaker Corp.*, 289 NLRB at 934. *See also Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, slip op. at 4 ("under Board precedent, concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed") (citing *El Gran Combo*, 284 NLRB 1115, 1117 (1987) (conduct remained concerted even though employee was unsuccessful in gaining support of other employees to protest wages), enfd. 853 F.2d 996 (1st Cir. 1988)).

[9] *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, slip op. at 3 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

[10] *Id.*, slip op. at 5 (quoting *Meyers II*, 281 NLRB at 887).

Applying these principles, the Charging Party's Facebook comments were concerted activity because they sought to bring employee complaints to management's attention and to initiate or induce group action. Specifically, the Charging Party posted on GP's Facebook page because [redacted] was upset that GP was treating its contractors' employees differently than its own employees. Indeed, days before posting [redacted] comments on Facebook, [redacted] had pointed out to an H&M coworker who [redacted] knew to be a veteran that GP's Veterans Day function would not include H&M's veteran employees. The coworker responded "that's bullshit." Thus, the Charging Party's Facebook posts raised a shared complaint about how GP treated its contractors' employees.

It is important to recognize that the Charging Party is not a veteran, and therefore [redacted] posts' primary message advocated not on [redacted] own behalf, but on behalf of veterans working for GP's contractors. This negates any inference that the Charging Party was expressing a purely personal gripe. Moreover, the Charging Party's Facebook posts should be read to advocate for better treatment and working conditions on behalf of contractor employees generally. [redacted] comments regarding GP's Veterans Day function were an extension of [redacted] prior concerns about GP's treatment of its contractors' employees, which were based on GP having provided only its own employees with a steak dinner during mill shutdowns.[11] In short, [redacted] expressions of support for immediate coworkers and other contractors' employees by advocating for a positive change to their lot as employees constituted a basic form of concerted activity covered by Section 7.[12]

Further, the Charging Party's comments sought to induce group action because they were made publicly on GP's Facebook page and concerned working conditions.[13]

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[11] *Cf. Salisbury Hotel,* 283 NLRB 685, 686-87 (1987) (holding that when determining if an employee's actions constitute concerted activity, the conduct must not be "considered in isolation" but along with other workplace events; although there was no evidence employees had agreed to act together, they complained among themselves and to the manager about a newly announced lunch hour policy).

[12] *Tyler Bus. Servs., Inc.*, 256 NLRB 567, 567-68 (1981) (finding concerted a full-time employee's advocacy for health benefits for part-time employees because employee's statements were "expressed on behalf of employees other than himself"), enf. denied 680 F.2d 338 (4th Cir. 1982); *see also St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007) ("It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity."), enfd. 519 F.3d 373 (7th Cir. 2008).

[13] *Whittaker Corp.*, 289 NLRB at 934 (inferring an attempt to induce group action based on employee's statements at a group meeting).

As noted above, the Charging Party already had raised the issue with one H&M coworker and [redacted] then used GP's social media platform to expand the scope of that prior concerted activity. While [redacted] was the only employee who posted a work-related complaint on GP's Facebook page, group action typically begins with one employee raising an employment concern. As the Board has described, "[m]anifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization."[14] The Charging Party's comments were a necessary predicate to any group action, and because they were made in a public forum the necessary inference is that they sought to engender a larger response from coworkers. Moreover, the fact that the Charging Party was not successful in garnering support for the issue [redacted] raised from coworkers or other employees does not affect the analysis. Conduct remains concerted where an employee appeals to others for support, even if that support never materializes.[15]

At the same time, we conclude that the Charging Party's actions were for "mutual aid or protection" because they were aimed at improving employment conditions for [redacted] H&M coworkers, and employees working for other GP contractors at the mill.[16] Namely, the Charging Party's comments were an effort to change how GP treated its contractors' employees. Although [redacted] comments were not directed specifically at [redacted] employer, under Section 7 employees have a right to appeal to the public, employees of other employers, or other employers to attempt to change their employment conditions.[17] Moreover, although [redacted] efforts focused on a work-

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[14] *Meyers II*, 281 NLRB at 887; *see also Staffing Network Holdings, LLC*, 362 NLRB No. 12, slip op. at 8 (Feb. 4, 2015) ("Under Board law, even a single employee's complaint about the treatment or discipline of another constitutes concerted activity.").

[15] *See* the cases cited at footnote 8, *supra*.

[16] *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, slip op. at 5; *see also Five Star Transportation*, 349 NLRB 42, 47 (2007) (letters written by individual bus drivers to school board, rather than to new non-union employer, were protected concerted activity for mutual aid or protection where each driver referred to concerns about maintaining the drivers' terms and conditions established under the prior unionized employer).

[17] *See, e.g., NCR Corp.*, 313 NLRB 574, 576 (1993) ("Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations."); *Jimmy John's*, 361 NLRB No. 27, slip op. at 3, 4-7 & n.15 (Aug. 21, 2014) (employees may publicly complain about employer unless employees' actions are "shown to be so disloyal, reckless, or maliciously untrue as to lose the Act's protection"), enfd. sub nom. *MikLin*

related issue not directly involving [redacted] immediate employer, the Board has long held that the phrase "mutual aid or protection" includes the right to engage in concerted activity on matters beyond the immediate employment relationship. "Section 7 is not strictly confined to activities which are immediately related to the employment relationship or working conditions, but extends to" other employee concerns that are "close enough in kind and character, and bear such a reasonable connection to matters affecting the interests of employees *qua* employees."[18] In short, the Charging Party permissibly sought to improve the "lot" of GP's contractors' employees "through channels outside the immediate employee-employer relationship."[19]

Enterprises, Inc. v. NLRB, 818 F.3d 397 (8th Cir. 2016); *New York Party Shuttle, LLC,* 359 NLRB No. 112, slip op. at 1 (May 2, 2013) (tour guide's email and Facebook entries appealing to employees of different employers constituted union activity; communications were continuation of known prior organizational activity), enfd. No. 13-60364 (5th Cir. 2013), validity recognized in 2015 WL 8476222, at n.3 (Dec. 8, 2015) (Board order denying employer's petition to revoke subpoena duces tecum). *See also Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982) (finding employer unlawfully discharged employee for protected activity of writing letter to employer's client stating that the facility was "deteriorating" because the employer, a cleaning service, was diluting the cleaning products thereby making the employees' jobs more difficult and the building less clean), enfd. mem. 742 F.2d 1438 (2d Cir. 1983); *Richboro Cmty. Mental Health Council*, 242 NLRB 1267, 1267 (1979) (finding concerted activity remained protected where employee wrote letters to federal and state agencies that funded employer, a U.S. Congressman, and a local newspaper on behalf of another employee who had been discharged by the employer).

[18] *G&W Elec. Specialty Co.*, 154 NLRB 1136, 1137-38 (1965) (finding employer unlawfully discharged employee for circulating petition protesting manner in which employee-run credit union was being operated; "mutual aid or protection" extends beyond mandatory subjects of bargaining or "activities directly and immediately involving the employment relationship"), enf. denied 360 F.2d 873 (7th Cir. 1966). Although the Seventh Circuit denied enforcement of the Board's decision in *G&W Elec.*, the Supreme Court in *Eastex*, 437 U.S. 567, n.17, subsequently questioned the validity of the circuit court's decision. *See also General Electric Co.*, 169 NLRB 1101, 1103 (1968) (holding that employees' concerted activity of collecting money to support striking agricultural workers in nearby area constituted mutual aid or protection even though it did not directly affect the employees' terms and conditions of employment), enfd. 411 F.2d 750 (9th Cir. 1969) (per curiam).

[19] *Eastex, Inc. v. NLRB*, 437 U.S. at 565, 569-70 (holding that union officers-employees were engaged in mutual aid or protection in seeking to distribute to coworkers a newsletter that, among other things, urged coworkers to write to their state legislators to oppose a state "right-to-work" constitutional amendment and criticized the presidential veto of a federal minimum wage increase and urged

Finally, the Charging Party's November 5 postings did not lose the protection of the Act. An employee's off-duty, offsite use of social media to communicate with other employees or third parties is protected so long as the "communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection."[20] Here, the Charging Party's comments were restricted to [redacted] complaints about employment conditions. [redacted] did not disparage either GP's products or the services being provided by H&M. Moreover, [redacted] did not falsify any information. Accordingly, [redacted] comments remained protected.

B. H&M Violated Section 8(a)(1) By Laying Off the Charging Party Because of [redacted] Facebook Posts.

An employer violates Section 8(a)(1) of the Act by interfering with an employee exercising his or her Section 7 rights.[21] H&M does not dispute that it discharged the Charging Party for [redacted] Facebook postings. Because we have found that the Charging Party's Facebook postings constituted protected concerted activity, we conclude that H&M violated Section 8(a)(1) when it laid off the Charging Party in response to that activity.[22] No motive analysis is necessary in this case because H&M has not offered

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coworkers to vote for labor-friendly political candidates). *See also Kaiser Engineers*, 213 NLRB 752, 755 (1974) (discriminatee engaged in mutual aid or protection by writing letter to U.S. legislators on behalf of in-house employee organization opposing perceived effort by employer's competitor to obtain from Department of Labor eased restrictions on the importation of foreign engineers; letter did not request action from discriminatee's immediate employer and the issue was not one over which the employer had any control), enfd. 538 F.2d 1379, 1384-85 (9th Cir. 1976).

[20] *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 3-4, 5 (Aug. 22, 2014) (citations omitted), enfd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015).

[21] 29 U.S.C. § 158(a)(1). *See, e.g., EF Int'l Language School,* 363 NLRB No. 20, slip op. at 1 n.2, 12 (Oct. 1, 2015); *Parexel Int'l, LLC*, 356 NLRB 516, 518 (2011) (finding employer's attempt to prevent future protected concerted activity by discharging an employee for discussing wages violated Section 8(a)(1)).

[22] *See. e.g., Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000) (finding employer violated Section 8(a)(1) by discharging employee for speaking out during a group meeting against new break policy and how managers scheduled work), enfd. 262 F.3d 184 (2d Cir. 2001).

a separate and independent basis for the Charging Party's discipline.[23] Again, H&M concedes that it disciplined the Charging Party for [redacted] Facebook comments. Because we have already concluded that the comments did not lose the protection of the Act, the discipline violated Section 8(a)(1)—regardless of H&M's motivations.[24]

C. Georgia Pacific is Not a Joint-Employer with H&M Construction, and is Not Jointly and Severally Liable for H&M's Unfair Labor Practice.

Initially, regarding whether GP and H&M are joint employers, in *BFI Newby Island Recyclery*, the Board reaffirmed that two or more employers are joint employers of the same employees if (1) they are "both employers [of a single workforce] within the meaning of the common law" and (2) they "share or codetermine those matters governing the [employees'] essential terms and conditions of employment."[25] The Board determines if a common law employment relationship exists by examining whether the employees perform services for the putative joint employer and are subject to the putative joint employer's control or right to control how those services are conducted.[26] If the common-law test is satisfied, the Board then determines whether the putative employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective-bargaining."[27] In this regard, the Board held that it would no longer require that a joint employer both possess the authority to control employees' terms and conditions of employment and exercise that authority directly, immediately, and "not in a 'limited and routine' manner."[28] Rather, the Board concluded it would find joint employer status where the putative joint employer has the right to control, in the common-law sense, "the means or manner of employees' work and terms of

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[23] *Id.*, 331 NLRB at 864 ("where protected concerted activity is the basis for an employee's discipline, the normal *Wright Line* analysis is not required").

[24] *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002), enfd. mem. 63 Fed. Appx. 524 (D.C. Cir. 2003).

[25] 362 NLRB No. 186, slip op. at 2, 15 (Aug. 27, 2015).

[26] *Id.*, slip op. at 12-17 & n.65, 18 n.96.

[27] *Id.*, slip op. at 2.

[28] *Id.*, slip op. at 15-16 (overruling Board decisions, including *TLI, Inc.,* 271 NLRB 798 (1984), enfd. mem. sub nom. *Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984)).

employment, either directly or [indirectly] through an intermediary."[29] However, if a putative joint employer's control over terms and conditions of employment is too limited in scope or significance to permit meaningful collective bargaining, the Board stated that it may decline to find a joint employer relationship.[30]

Here, we conclude that GP is not a joint employer with H&M because GP does not have the requisite authority to control H&M's employees or set their terms and conditions of employment. GP does not supervise H&M's employees on a daily basis, assign them work, or transfer them to different jobs. It also has not established any workplace rules for H&M's employees. GP employees do not perform H&M work, nor do H&M employees regularly perform work done by GP employees. Additionally, H&M owns all the equipment that its employees use. There is virtually no day-to-day interaction between GP management and H&M personnel. Rather, H&M retains control over its labor policies, including hiring, wages, fringe benefits, discipline, grievances, and daily supervision.

The only evidence of GP's ability to control H&M's employees is the service agreement between the two companies that imposes certain staffing and scheduling requirements on H&M for the ARC mill landfill operation. The agreement requires H&M to have sufficient personnel onsite to ensure a smooth operation. It also requires H&M to have a day-shift crew on duty eight hours per day, five days a week, and shift workers operating on two 12-hour shifts, seven days a week. However, those provisions do not dictate the hours that any particular employee must work, and their purpose is to ensure only that H&M adequately provides the services for which it was retained by GP. Thus, these minimal staffing and scheduling requirements are insufficient to establish a joint employer relationship.[31]

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[29] *Id.*, slip op. at 2, 15-16, 18-20 (finding that two statutory employers were joint employers of a single workforce where, per their temporary labor services agreement, the supplier employer recruited, selected, and hired employees for the user employer which could, in turn, reject and discharge employees and exert control over their wages, work shifts, and productivity and safety standards, even though the agreement specified that the supplier was the sole employer).

[30] *Id.*, slip op. at 16.

[31] *See, e.g., S.G. Tilden, Inc.*, 172 NLRB 752, 753 (1968) (finding under Board's traditional test that franchisor was not joint employer despite franchise agreement requiring franchisees to observe pricing and housekeeping standards, have their employees wear prescribed uniforms, and remain open for set hours of business; these requirements did not evidence franchisor's control over the franchisees' labor policies, but maintained the franchisor's brand and eliminated unfair competition among franchisees); *Hychem Constructors, Inc.*, 169 NLRB 274, 276 (1968) (finding under Board's traditional test that general contractor was not joint employer of

Second, regarding whether GP is jointly and severally liable for H&M's unfair labor practice here, "it is well settled that an employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, lay off, transfer or otherwise affect the working conditions of the latter's employees" because of the protected concerted or union activities of those employees.[32] Here, because there is little evidence that GP played any direct role in the Charging Party's layoff, we conclude that GP is not jointly and severally liable for H&M's unlawful lay off of the Charging Party. According to witnesses from both employers, GP's (b) (6), (b) (7)(C) told an H&M Supervisor about the Facebook posts. However, each individual confirms the other's testimony that GP's (b) (6), (b) (7)(C) did not ask or instruct H&M to take any adverse personnel action against the Charging Party. Instead, H&M decided on its own to lay off the Charging Party based on (b) (6), (b) (7)(C) Facebook posts. The only evidence that GP caused H&M's actions is the Charging Party's own statement that the H&M Supervisor told (b) (6), (b) (7)(C) during their meeting on (b) (6), (b) (7)(C) that GP wanted the Charging Party discharged, and that the Charging Party was blackballed from every other GP mill. However, no other evidence corroborates those statements, and the testimony from H&M's and GP's officials indicates that the decision was made solely by H&M

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subcontractor's employees despite subcontract giving it the right to approve wage increases and overtime and have subcontractor's employees follow plant rules; authority general contractor retained merely allowed it to police costs of subcontract and maintain safety and security of its premises).

[32] *Reliant Energy*, 357 NLRB 2098, 2099 (2011) (power plant violated Section 8(a)(3) and (1) by directing subcontractor to remove from its property a well-known union employee who was collecting authorization cards and answering questions about unionization from the power plant's employees). *See also Esmark, Inc.,* 315 NLRB 763, 764, 767-68 (1994); *Int'l Shipping Ass'n*, 297 NLRB 1059, 1059 (1990) (pharmaceutical company held liable for causing the subcontractor operating its warehouse to refuse to hire pro-union employees); *Georgia Pacific Corp.*, 221 NLRB 982, 987 (1975). Although the preceding cases found Section 8(a)(3) violations, the Board has relied on the same rationale to find a Section 8(a)(1) violation. *See Jimmy Kilgore Trucking Co.*, 254 NLRB 935, 935, 947 (1981) (trucking company that leased employees from sole proprietor violated Section 8(a)(1) by causing the sole proprietor to terminate an employee because he had asked for a raise with his coworkers); *Fabric Services*, 190 NLRB 540, 542 (1971) (client company violated Section 8(a)(1) by requiring employee of telephone company to remove his union pocket protector while working on its premises).

management. We therefore conclude that GP may not be held liable for H&M's unlawful lay off of the Charging Party.[33]

Accordingly, the Region should issue complaint, absent settlement, based on the analysis set forth above.

/s/
B.J.K.

h://ADV.15-CA-164416.Response.HM Construction.(b) (6), (b) (7)(

[33] We note that if GP subsequently refuses to allow the Charging Party to work at ARC or another of its mills based on (b) (6), (b) (protected concerted activity in the current case, a charge may be appropriate for that adverse personnel action. *See, e.g., Host Int'l*, 290 NLRB 442, 443 (1988) (employer violated Section 8(a)(1) and (4) by refusing to hire two employees because of their previous protected concerted activities of filing a federal court lawsuit and Board charges against the employer). However, on the existing record we conclude GP has not acted unlawfully in this case.

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 3, 2015

TO: Rhonda P. Ley, Regional Director
Region 3

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Brooks Memorial Hospital 177-1650-0100
Case 03-CA-148201 530-4825-5000

The Region submitted this case for advice as to whether a hospital and the company that manages its onsite pharmacy are joint employers of the pharmacy technicians who work there; whether the Union waived its right to bargain with the hospital when it entered into a collective-bargaining agreement with the pharmacy management company; and whether it would effectuate the purposes of the Act to proceed against the hospital given that the Union has already reached a collective-bargaining agreement with the pharmacy management company.

We conclude that, under *BFI Newby Island Recyclery*,[1] the hospital and the pharmacy management company are joint employers of the pharmacy technicians because, among other things, the agreement between the entities grants the hospital the right to end the pharmacy technicians' employment. We also conclude that the Union has not waived its right to bargain with the hospital regarding the pharmacy technicians merely because it has entered into a collective-bargaining agreement with the pharmacy management company. Finally, we conclude that issuing complaint over the hospital's general refusal to bargain over the pharmacy technicians will effectuate the policies and purposes of the Act.

FACTS

Background

Brooks Memorial Hospital ("Brooks" or "the hospital") is an acute care hospital located in Dunkirk, New York. Since 2001, Nash Pharmacy Services, PC ("Nash") has

[1] 362 NLRB No. 186, slip op. at 2 (Aug. 27, 2015).

managed the hospital's pharmacy department. Prior to March 2014, Nash employed a (b) (6), (b) (7)(C) and staff pharmacists and supervised [redacted] pharmacy technicians who were directly employed by Brooks. The pharmacy technicians assist the staff pharmacists by dispensing medications for the hospital's patients and deliver medication throughout the hospital. On March 1, 2014, pursuant to a new pharmacy service agreement with Brooks, Nash became responsible for providing pharmacy technicians to the hospital, along with (b) (6), (b) (7)(C) and staff pharmacists. Around this time, Nash hired the [redacted] existing pharmacy technicians to continue working at the hospital's pharmacy.

Historically, 1199 SEIU United Healthcare Workers East ("the Union") has represented a unit of approximately 180 Brooks employees, including the pharmacy technicians. In the spring of 2014, Brooks and the Union entered into negotiations for a successor collective-bargaining agreement. The parties agreed that the position of pharmacy technician would be listed as an "inactive classification," along with other job titles included in an addendum to the agreement. Around August 2014, the Union and Brooks reached agreement on a successor contract.

In the fall of 2014, Nash recognized the Union as the bargaining representative of the pharmacy technicians, and, in early 2015, the Union and Nash began bargaining for an initial CBA. On February 1, 2015,[2] while these negotiations were underway, the Union told Brooks that it should join the negotiations as a joint employer of the pharmacy technicians. Brooks denied that it was a joint employer and declined the Union's invitation to join the negotiations. On March 16, the Union filed the instant charge alleging that Brooks, as a joint employer of the pharmacy technicians, failed and refused to bargain with the Union. On April 15, Nash and the Union finalized a collective-bargaining agreement covering the pharmacy technicians.

The Pharmacy Agreement and Current Pharmacy Operations

The current pharmacy service agreement between Nash and Brooks states that Nash agrees to provide [redacted] pharmacy technicians "who will each work 40 hours per week during such operating hours [as specified in an appendix] and in such numbers as required by" the hospital. Nash is responsible for scheduling the technicians' days and hours within these parameters.

The pharmacy agreement allows Brooks to order the removal of a pharmacy technician if, "in the sole discretion of" Brooks, (1) the technician "poses a risk to the health, safety or medication condition of any employee, patient, or patron of" the hospital; (2) Brooks "reasonably disapproves of the conduct of"a pharmacy technician; or (3) Brooks "believes any [pharmacy technician] interferes with the business or

[2] All dates *infra* are 2015 unless otherwise noted.

operations of" the hospital. The agreement is silent as to whether Brooks may impose discipline but, on at least one occasion, a hospital (b) (6), (b) (7)(C) requested that Nash discipline a technician for violating a procedure and the pharmacy complied with that request. Nash is also permitted to discharge, suspend or terminate any pharmacy technician provided that it gives Brooks "prompt written notice."

When the pharmacy technicians are physically working in the pharmacy, they are (b) (6), (b) (7)(C) by the (b) (6), (b) (7)(C) or the staff pharmacists. When the technicians are delivering medication throughout the hospital, they interact with hospital supervisors and managers. According to Nash, Brooks personnel do not regularly direct the pharmacy technicians while they are delivering medication because all of the technicians are familiar with their duties. However, the pharmacy technicians report that the (b) (6), (b) (7)(C) regularly receives emails from Brooks regarding the technicians' performance and relays those comments and concerns to the technicians. And on at least one occasion, a hospital manager directly addressed pharmacy technicians' work performance: the manager verbally rebuked a group of technicians after observing that a technician had left a medication cart unattended in a hospital elevator.

The pharmacy agreement requires that all pharmacy personnel participate in a "quality assurance program," including continuing education programs. The agreement further requires that pharmacy technicians shall be licensed in accordance with New York law and that Nash will ensure that the technicians comply with all of Brooks's policies and procedures. When the pharmacy technicians were hired by Nash, they were required to take a certification test for the first time, and Brooks reimbursed the technicians for the cost of the test. According to the pharmacy technicians, they also participate in required continuing education programs held at the hospital for Brooks staff.

Pharmacy technicians' day-to-day tasks depend in part on the needs of the hospital and its patients. For example, when Brooks instituted a new system for dispensing medication to surgical patients, the pharmacy technicians became responsible for servicing the new machines. And, in at least one instance, a pharmacy technician had to adjust (b) (6), (b) hours of work in order to service the machines before surgeries began.

Pharmacy technicians wear Brooks identification badges and participate in hospital-sponsored employee social events such as holiday parties and summer picnics. The pharmacy technicians use Brooks email accounts, and the pharmacy's computer systems are maintained by the hospital. Brooks also provides all of the pharmacy's equipment and supplies.

Finally, the pharmacy service agreement may be terminated by either party upon 180 days' notice, with or without cause. Brooks may also, "in its sole discretion,"

terminate the contract immediately if, among other reasons, Brooks determines that Nash has "jeopardized or disrupted" the well-being of any patient or hospital operations.

ACTION

We conclude that Brooks and Nash are joint employers of the pharmacy technicians because, among other things, the pharmacy service agreement grants Brooks the right to end the pharmacy technicians' employment. We also conclude that the Union has not waived its right to bargain with Brooks regarding the pharmacy technicians merely because it has entered into a collective-bargaining agreement with Nash. Finally, we conclude that issuing complaint over the hospital's general refusal to bargain over the pharmacy technicians will effectuate the policies and purposes of the Act.

In *BFI Newby Island Recyclery*, the Board reaffirmed that two or more employers are joint employers of the same employees if (1) they are "both employers [of a single workforce] within the meaning of the common law" and (2) they "share or codetermine those matters governing the [employees'] essential terms and conditions of employment."[3] The Board determines if a common law employment relationship exists by examining whether the employees perform services for the putative employer and are subject to the putative employer's control or right to control how those services are conducted.[4] If the common-law test is satisfied, the Board then determines whether the putative employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective-bargaining."[5] In this regard, the Board held that it would no longer require that a joint employer both *possess* the authority to control employees' terms and conditions of employment and *exercise* that authority directly, immediately, and "not in a 'limited and routine' manner."[6] Rather, the Board concluded, it would also find joint employer status where the putative employer has the *right* to control, in the common-law sense, "the means or manner of employees' work and terms of employment," or actually exercises such control, "either directly or [indirectly]

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[3] 362 NLRB No. 186, slip op. at 15.

[4] *Id.*, slip op. at 12-17, 18 n.96.

[5] *Id.*, slip op. at 2.

[6] *Id.*, slip op. at 15-16 (overruling Board decisions, including *TLI, Inc.*, 271 NLRB 798 (1984), *enforced mem. sub nom. Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985) and *Laerco Transportation*, 269 NLRB 324 (1984)).

through an intermediary."[7] However, if a putative employer's control over terms and conditions of employment is too limited in scope or significance to permit meaningful collective bargaining, the Board stated that it may decline to find a joint employer relationship.[8]

Here, Brooks meets the common law definition of an employer of the pharmacy technicians. Pharmacy technicians are employed solely to perform services on behalf of the hospital, including dispensing medication and delivering medication to Brooks patients.[9] Also, Brooks controls many aspects of the pharmacy technicians' services, including dictating that the technicians will work forty hours a week during specific operating hours and requiring that the technicians follow all hospital policies and procedures.[10] Therefore, the evidence demonstrates that Brooks is a common-law employer of the pharmacy technicians and satisfies the first step of the Board's joint employer standard.

Under the second step of the joint employer test, we find that Brooks possesses significant control over the pharmacy technicians' essential terms and conditions of employment. First, the hospital, "in its sole discretion," can require that Nash remove pharmacy technicians from the hospital, effectively ending their employment.[11] Thus, like the user employer in *BFI Newby Island Recyclery*, Brooks has a "virtually

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[7] *Id.*, slip op. at 2, 3-6, 15-16, 18-20 (finding that two statutory employers were joint employers of a single workforce where, per their agreement, the supplier employer recruited, selected, and hired employees for the user employer which could, in turn, reject and discharge employees and exert control over their wages, work shifts, and productivity and safety standards, even though the agreement specified that the supplier was the sole employer).

[8] *Id.*, slip op. at 16.

[9] *See id.*, slip op. at 18 n.96 (citing Restatement (Second) of Agency §220 cmt. 1 (1958) (where "work is done upon the premises of the employer with his machinery by workmen who agreed to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are servants of the [employer]")).

[10] *Cf. id.*, slip op. at 18-19 (user firm specified productivity standards and timing of shifts for supplier firm's employees).

[11] There is no evidence to suggest that Nash operates pharmacies at any other location where it might be able to transfer the technician but, even if it did, effectively forcing a transfer to another location would significantly impact the affected employee's terms and conditions of employment.

unqualified right to request the removal" of a pharmacy technician.[12] The hospital also has the right to terminate Nash's service agreement if it determines that Nash has interfered with the hospital's operations.[13]

Second, Brooks "dictate[s] the number of workers to be supplied" by specifying in the service agreement that Nash provide four pharmacy technicians.[14] Furthermore, Brooks places restrictions on Nash's selection of pharmacy technicians because the agreement imposes a new requirement that pharmacy technicians have or obtain state certification.[15]

Third, Brooks also exercises control over the pharmacy technicians' hours of work because Brooks dictates the pharmacy's operating hours and requires that the technicians work a forty-hour week.[16] Although Nash is responsible for determining which pharmacy technicians will work various shifts, in some instances, the hospital has required modifications to employees' hours, such as when Brooks required

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[12] *See id.*, slip op. at 18 & n.101 (citing *Ref-Chem Co.*, 169 NLRB 376, 379 (1968), *enforcement denied on other grounds*, 418 F.2d 127 (5th Cir. 1969)).

[13] *Cf. id.*, slip op. at 3, 18 (contract between user and supplier firm terminable at will); *see also Thriftown, Inc.*, 161 NLRB 603, 607 (1966) (finding user firm's right to terminate contract at will as evidence of control of supplier firm's labor policies).

[14] *See BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 19 (finding joint employer status, in part, because user firm specified number of workers it required from supplier firm).

[15] *See generally, Hamburg Industries*, 193 NLRB 67, 67-68 (1971) (finding joint employer relationship because, among other things, user firm required supplier firm's employees to follow its plant safety rules and regulations); *see also BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 18 (finding joint employer status, in part, because user firm required that supplier "meet or exceed" user firm's selection procedures and tests, including drug tests).

[16] *See id.*, slip op. at 19 (finding joint employer status, in part, because user employer determined when overtime is necessary and employees were required to obtain signature of user employer representative confirming hours worked); *Jewel Tea Co.*, 162 NLRB 508, 510 (1966) (finding joint employer status, in part, because license agreements required licensees to abide by licensor's policies regarding work hours, holidays, and vacations).

pharmacy technicians to service new surgical equipment before their scheduled shifts.[17]

Fourth, Brooks exercises both direct and indirect supervision of pharmacy technicians. Brooks provides feedback on a regular basis to Nash regarding technicians' performance, and Nash relays that feedback to the technicians.[18] There have also been instances where hospital supervisors directly addressed the pharmacy technicians' job performance, such as the example of the hospital supervisor rebuking the technicians when one of the technicians left a medication cart unattended. Brooks also plays a significant role in how pharmacy technicians conduct their work by requiring technicians to follow all hospital policies and procedures and participate in its continuing education and in-service training programs.[19]

Fifth, there are additional indicia of control that further demonstrate that Brooks is a joint employer of the pharmacy technicians. Specifically, Brooks holds out the pharmacy technicians to the public as its own employees and considers them to be working for the hospital.[20] Thus, pharmacy technicians must wear Brooks identification badges and have hospital email addresses. In addition, all the supplies and equipment that the technicians use to perform their jobs is provided by Brooks, and Brooks is also responsible for servicing the equipment.

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[17] *See Sun-Maid Growers of California*, 239 NLRB 346, 350-351 (1978) (finding joint employer status where user firm's production schedule controlled supplier firm's employees' schedules and user firm required employees to change their schedules when its production schedule so required), *enforced per curiam*, 618 F.2d 56, 59 (9th Cir. 1980).

[18] *See BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 16, 19 (user firm communicated feedback and direction of employee performance through supplier's supervisors).

[19] *See, e.g., Thriftown, Inc.*, 161 NLRB at 607 (joint employer finding supported by user firm's requirement that supplier and supplier's employees conform to all practices and policies dictated by user firm).

[20] *See, e.g., CNN America, Inc.*, 361 NLRB No. 47, slip op. at 7 (Sept. 15, 2014) (finding user firm to be joint employer, in part, because it provided virtually all equipment and required supplier's employees to use its badges and credentials); *see also Thriftown, Inc.*, 161 NLRB at 605, 607 (user firm's requirement that supplier's employees wear a common uniform supported joint employer finding).

As described above, Brooks determines or has the right to determine many of the pharmacy technicians' terms and conditions of employment, both directly and indirectly, which therefore satisfies the second step of the Board's joint employer test. As joint employers, the hospital and Nash both have a duty to bargain over mandatory subjects of bargaining. In this regard, although the hospital is not a party to the collective-bargaining agreement that the Union reached with Nash and is not bound to that agreement, nonetheless, it has a duty to bargain with the Union when employee matters arise during the life of the agreement with respect to terms and conditions which Brooks "possesses the authority to control."[21]

Brooks argues, however, that the Union waived its right to bargain by first, agreeing to place the pharmacy technicians on a list of inactive classifications during bargaining for the larger hospital agreement and, second, by subsequently reaching agreement with Nash on a contract covering the pharmacy technicians. We reject both of these waiver arguments. First, during bargaining for the larger hospital agreement, the Union did not "clearly and unmistakably" waive its future bargaining rights vis-à-vis the hospital with respect to the pharmacy technicians.[22] The larger hospital agreement's listing of pharmacy technicians as an "inactive classification" can reasonably be construed as reflecting the Union's consent that the technicians—who had theretofore been included in the hospital-wide unit—would not be covered by the larger hospital agreement while their work was being contracted out to Nash. In the absence of bargaining history (or other evidence of the parties' intent) to the contrary, the Employer cannot demonstrate a "clear and unmistakable" waiver of the right to bargain with Brooks over the pharmacy technicians altogether.[23] In rejecting Brooks's second waiver argument, we emphasize that the Union invited Brooks to join its negotiations with Nash and therefore asserted its interest in bargaining with

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[21] *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 16.

[22] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-09 (1983) (holding that waiver of right to bargain must be "clear and unmistakable"); *Provena St. Joseph Medical Center*, 350 NLRB 808, 811, 821 (2007) (reaffirming that Board will apply "clear and unmistakable" standard for finding contractual waiver; Board considers wording of pertinent contract provisions, bargaining history, past practice, and other contractual provisions that might shed light on parties' intent).

[23] *See, e.g., KIRO, Inc.*, 317 NLRB 1325, 1327-28 (1995) (finding union did not waive right to bargain over effects of employer decision to produce additional news segment where agreement only gave employer general right to schedule and assign work and no other evidence supported employer's interpretation); *cf. NLRB v. Henry Vogt Mach. Co.*, 718 F.2d 802, 806-08 (6th Cir. 1983) (finding waiver where union had clear and unequivocal notice that certain employees were going to lose cafeteria privilege by joining the unit but the union failed to raise the issue during bargaining).

Brooks over the technicians. Although a contract was ultimately reached without Brooks's participation, this was not the Union's doing; it was due to Brooks's flat refusal to bargain.[24] Moreover, in *BFI Newby Island Recyclery*, the Board explicitly stated that joint employer status may still be found even if meaningful bargaining can occur without the participation of the putative joint employer, notwithstanding that certain terms controlled by that employer would be excluded from bargaining.[25]

We also would reject an argument that Brooks's control over pharmacy technicians' terms and conditions of employment is too limited in scope or significance to permit meaningful collective bargaining. As detailed above, Brooks controls the numbers of technicians employed, their hours of work, the rules they must follow, and their required skills and ongoing training. Furthermore, Brooks directly and indirectly supervises the technicians' performance and even has the right to effectively end their employment. Brooks's control over these areas, among others listed above, is more than sufficient to permit the Union and Brooks to engage in meaningful bargaining regarding the technicians' terms and conditions of employment.

In sum, we conclude that Brooks is a joint employer of the pharmacy technicians and, therefore, has a duty to bargain with the Union in regards to terms and conditions which it possesses the authority to control, even during the term of the Union's agreement with Nash.[26] Indeed, the Union may need to include Brooks in negotiations in order to meaningfully address employee matters directly or indirectly controlled by Brooks as they arise. Under these circumstances, we conclude that it would effectuate the purposes and policies of the Act to proceed in this case. Therefore, the Region should issue complaint, absent settlement, alleging that Brooks, as a joint employer, violated Section 8(a)(5) by refusing to bargain with the Union over the pharmacy technicians.

/s/
B.J.K.

ADV.03-CA-148201.Response.Brooks.[redacted]

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[24] *Cf. CNN America*, 361 NLRB No. 47, slip op. at 8 (finding user firm was a joint employer despite lengthy prior bargaining history between union and supplier firms, which had never included the user firm).

[25] 362 NLRB No. 186, slip op. at 13 n.68.

[26] *See Columbia University*, 298 NLRB 941, 945 (1990) ("[T]he duty to bargain does not end with the reaching of an agreement; it is a duty that continues throughout the term of the agreement.").

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M. DATE: May 24, 2016

TO: Harold A. Maier, Acting Regional Director
Region 4

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Trump Entertainment Resorts, Inc., et al. and Icahn Enterprises, et al., Joint Employers
Cases 04-CA-143464, et al.

Employer Status
133-8200
177-1650
530-6067-4000
530-6067-4033
530-6067-4055
596-0175-8100
867-2520-7567-5000
867-2540-8367

These cases were resubmitted for advice as to how to proceed after the United States Court of Appeals for the Third Circuit affirmed a bankruptcy court order that authorized at least some of the unilateral changes at issue here. We conclude that the Region should issue complaint as to those meritorious allegations that were not affected by the affirmed bankruptcy court order, including the allegations of unlawful unilateral changes that were not clearly authorized by the bankruptcy court order, and should name both of the joint employers as respondents. The Region should continue to hold in abeyance the allegations affected by the bankruptcy court order, pending the completion of the ongoing litigation over that order.

FACTS

The facts and background of these cases are more fully set forth in our prior memorandum, dated July 1, 2015. In brief, these cases involve several unilateral changes expressly authorized by a bankruptcy court order, as well as other allegedly unlawful conduct, including Section 8(a)(1) statements, Section 8(a)(3) discrimination, Section 8(a)(5) denials of access and information to the Union, and other Section 8(a)(5) unilateral changes—allegations separate from the unilateral changes authorized by the bankruptcy court order. In our prior memorandum, which issued while the bankruptcy court order was on appeal to the Third Circuit, we concluded that: (1) Trump Entertainment Resorts, Inc. and its subsidiaries ("Trump") and Icahn Enterprises and its subsidiaries ("Icahn") are joint employers with respect to the employees at issue here, due to Icahn's influence over collective bargaining between

Trump and UNITE HERE Local 54 (the Union); and (2) the Region should hold the case in abeyance until the Third Circuit issued a decision as to the bankruptcy court order.

On January 15, 2016, the Third Circuit affirmed the bankruptcy court order in its entirety. Most significantly, the Third Circuit affirmed the order's provisions authorizing Trump to reject the terms of its expired collective-bargaining agreement with the Union and implement the terms and conditions of its proposal, specifically including authorization to withdraw from the Health and Welfare, Pension, and Severance Funds; implement an unpaid 30-minute meal break; change the full-shift guarantee for banquet bartenders from 8 to 4 hours; reduce holiday pay; and "to expand its right to direct and control employees, such as by consolidating jobs, by determining and re-determining job content and determining the assignment of work, in order to allow for a more flexible use of staff and generate cost-savings." In addition, the court affirmed the order's provisions containing general release and injunction language limiting the judicial and administrative claims of private parties subject to the bankruptcy court order, particularly those entities that agreed to be bound by the bankruptcy plan of reorganization.

On April 14, 2016, the Union filed a petition for a writ of certiorari to the Supreme Court, seeking to overturn the bankruptcy court order. The Union's petition is still pending.

In light of the Third Circuit's affirmance of the bankruptcy court order, the Region has resubmitted these cases for advice as to: (1) which meritorious charges are affected by the bankruptcy court order, and on which the Region should issue complaint; (2) whether the Region should proceed against both Trump and Icahn as joint employers, and (3) how the Region should proceed on the charges affected by the bankruptcy court order, particularly as the Third Circuit's affirmance of that order is still subject to a pending writ of certiorari to the Supreme Court.

ACTION

We conclude that the Region should issue complaint as to those meritorious allegations that were not affected by the bankruptcy court order, including the allegations of unlawful unilateral changes that were not clearly authorized by the bankruptcy court order, and should name both of the joint employers as respondents. The Region should continue to hold in abeyance the allegations affected by the bankruptcy court order, pending the completion of the ongoing litigation over that order.

The Region should issue complaint as to those meritorious allegations that were not affected by the affirmed bankruptcy court order.

Initially, we conclude that the Region should issue complaint as to those meritorious allegations of unlawful unilateral changes that were not clearly authorized by the bankruptcy court order.[1] The bankruptcy court order authorized Trump to reject the terms of its expired collective-bargaining agreement with Local 54 and implement the terms and conditions of its proposal, specifically including withdrawing from the Health and Welfare, Pension, and Severance Funds; implementing an unpaid 30-minute meal break; changing the full-shift guarantee for banquet bartenders from 8 to 4 hours; reducing holiday pay; and "to expand its right to direct and control employees, such as by consolidating jobs, by determining and re-determining job content and determining the assignment of work, in order to allow for a more flexible use of staff and generate cost-savings." Thereafter, based on the bankruptcy court's order, Trump implemented several changes, including retroactively ceasing its contributions to the healthcare, pension, and severance funds; an unpaid 30-minute meal break; reducing the full-shift guarantee for banquet bartenders from 8 to 4 hours; reducing holiday pay; increasing work assignments for housekeepers; and consolidating some bellman/doorman positions.

The bankruptcy court order issued under Section 1113 of the Bankruptcy Code, which permits a bankruptcy court to authorize a debtor's rejection of a collective-bargaining agreement but places important restrictions on that power.[2] As relevant here, Section 1113 requires that a court only approve a debtor's application for such relief if: (i) the debtor made a proposal to the employees' representative that, among other things, provides for modifications that are necessary for reorganization and treats all creditors and affected parties fairly; (ii) the employees' representative refuses the proposal without good cause; and (iii) the balance of equities clearly favors rejection.[3] When a court orders relief under that section, as the bankruptcy court did

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[1] All of our conclusions regarding the scope and effect of the bankruptcy court order were arrived at in consultation with, and with the agreement of, the Contempt, Compliance, and Special Litigation Branch (CCSLB). To the extent that any particular questions arise in the litigation of these cases concerning the effect of the bankruptcy court order, the Region may wish to contact CCSLB for their assistance and litigation advice.

[2] *See* 11 U.S.C. § 1113; *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074, 1081-84, 1086-89 (3d Cir. 1986) (detailing the history of the provision).

[3] 11 U.S.C. § 1113(c).

here, the debtor is no longer obligated to comply with the contract, and any resulting breach-of-contract damages are converted to an unsecured prepetition claim.[4]

Given this legal framework, to the extent Trump's changes were clearly authorized by the bankruptcy court order, (b) (5)

(b) (5)

In addition to the above unilateral changes clearly authorized by the bankruptcy court order, however, Trump also engaged in other allegedly unlawful conduct, including Section 8(a)(1) statements, Section 8(a)(3) discrimination, Section 8(a)(5) denials of access and information to the Union, and other Section 8(a)(5) unilateral changes—allegations separate from the unilateral changes authorized by the bankruptcy court order. Nothing in the bankruptcy court order authorized any of this allegedly unlawful conduct, and nothing in the bankruptcy court order precludes complaint on these allegations. Indeed, at no time were these issues ever considered in the bankruptcy proceedings. This is most evident as to the individual instances of

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[4] 11 U.S.C. § 365(g)(1) (deeming breach to occur immediately before date of petition). In this regard, the Union itself may have a right to bring an independent action seeking liquidated unsecured damages resulting from the changes, but the Board would appear to have no role in any such litigation.

[5] While we recognize that the changes here were authorized by the bankruptcy court *after* the expiration of the parties' collective-bargaining agreement, the Third Circuit expressly affirmed the validity of the order notwithstanding that distinction. Therefore, absent a Supreme Court decision invalidating the bankruptcy court order, we will consider Trump's changes made pursuant to that order to have been duly authorized, and not unlawful under the Act. (b) (5)

(b) (5)

[6] If the bankruptcy court order is ultimately found to be valid as a matter of law, the

(b) (5)

Section 8(a)(1) statements, Section 8(a)(3) discrimination, and Section 8(a)(5) denials of access and information to the Union that occurred after the bankruptcy court order issued, but is equally the case as to the unilateral changes Trump made that were not part of its bankruptcy proposal or covered by the bankruptcy court order. For example, after the bankruptcy court order issued, Trump unilaterally made numerous changes to employees' schedules, scheduling and terms of employees' breaks, and bidding procedures for schedules. While the bankruptcy court order authorized Trump to "determin[e] the assignment of work," it does not appear to have included any provisions authorizing these unilateral changes in the scheduling of work, including employees' breaks, or the unilateral changes in bidding procedures. Therefore, to the extent these and other of Trump's unilateral changes were made independently from any clear authorization of the bankruptcy court order, they should be treated the same as any other employer's unlawful unilateral changes, and complaint should issue on these allegations.

We note that nothing else in the bankruptcy court order would preclude such a complaint. In particular, while the bankruptcy court order included provisions containing general release and injunction language limiting the judicial and administrative claims of private parties subject to the bankruptcy court order, particularly those entities that agreed to be bound by the bankruptcy plan of reorganization, none of these provisions were intended to interfere with the Board's authority to proceed against unfair labor practices. Indeed, assuming *arguendo* that the bankruptcy court order had intended to preclude the Board from enforcing the Act generally, such an order would have been of dubious legality.[7]

Trump and Icahn are joint employers, both liable for the unfair labor practices at issue here.

We further conclude that Trump and Icahn are joint employers with respect to the employees at issue here. In our prior memorandum, we made this conclusion under the then-extant standard,[8] based primarily on Icahn's influence over collective

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[7] *See, e.g.*, *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 44 (3d Cir. 1942) ("The jurisdiction of a United States District Court in bankruptcy does not embrace the power to treat with a debtor's unfair labor practices which affect commerce. [N]or is such a court's leave to the Board to proceed in [an] appropriate manner required."); *W. T. Grant Regional Credit Center*, 225 NLRB 881, 881 n.1 (1976) (stating that the proposition that "Board proceedings are subject to a general restraining order issued by a court of bankruptcy has been uniformly rejected in both court and Board decisions").

[8] *See, e.g., CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (Sept. 15, 2014).

bargaining between Trump and the Union. In particular, we emphasized that Icahn's involvement in the collective-bargaining process meaningfully affected various matters relating to the employment relationship between Trump and the employees, including employees' wages, employees' work hours, and the assignment of work, and that Icahn inserted itself into the negotiations, making public statements designed to influence the bargaining process and playing a direct role in the unilateral changes at issue here. Consequently, we concluded that Icahn "shared or codetermined these key matters with Trump, and therefore is a joint employer."

Since we issued our prior memorandum, the Board clarified its joint employer standard.[9] In *BFI Newby Island Recyclery*, the Board reaffirmed the long-standing rule that two or more employers are joint employers of the same employees if (1) they are "both employers [of a single workforce] within the meaning of the common law" and (2) they "share or codetermine those matters governing the [employees'] essential terms and conditions of employment."[10] In discussing the common-law agency test, the Board emphasized that "the Board properly considers the existence, extent, and object of the putative joint employer's control,"[11] as well as that, "[u]nder common-law principles, the right to control is probative of an employment relationship—whether or not that right is exercised."[12] In this regard, the Board expressly held that it would no longer require that a joint employer both *possess* the authority to control employees' terms and conditions of employment and *exercise* that authority directly, immediately, and "not in a 'limited and routine' manner."[13] Rather, the Board concluded, it would also find joint employer status where the putative employer has the *right* to control, in the common-law sense, "the means or manner of employees' work and terms of employment," or actually exercises such control, "either directly or [indirectly] through an intermediary."[14] However, the Board also noted, if a putative

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[9] *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 2 (Aug. 27, 2015).

[10] *Id.*, slip op. at 15.

[11] *Id.*, slip op. at 12.

[12] *Id.*, slip op. at 13.

[13] *Id.*, slip op. at 15-16 (overruling Board decisions, including *TLI, Inc.*, 271 NLRB 798 (1984), *enforced mem. sub nom. Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985) and *Laerco Transportation*, 269 NLRB 324 (1984)).

[14] *Id.*, slip op. at 2, 3-6, 15-16, 18-20 (finding that two statutory employers were joint employers of a single workforce where, per their agreement, the supplier employer recruited, selected, and hired employees for the user employer which could, in turn, reject and discharge employees and exert control over their wages, work shifts, and

employer's control over terms and conditions of employment is too limited in scope or significance to permit meaningful collective bargaining, the Board may decline to find a joint employer relationship.[15] In any case, the Board made it clear in *BFI Newby Island Recyclery* that its intent was to broaden, rather than limit, the scope of its joint employer standard.

In the instant cases, there is nothing in *BFI Newby Island Recyclery* that would provide any basis for altering our previous conclusion that Trump and Icahn are joint employers of the employees at issue here. Thus, as we previously concluded, both employers shared or codetermined key matters of employees' terms and conditions of employment, and both employers meaningfully affected various matters relating to the employment relationship.[16] Therefore, we reiterate our adherence to our previous conclusion that Trump and Icahn are joint employers, and that Icahn is liable as well as Trump for any unfair labor practices found here.

We recognize that it might be argued that, while Trump and Icahn are certainly joint employers responsible for remedying each other's unlawful bargaining conduct, only Trump should be liable for any other unfair labor practices, such as violations of Section 8(a)(1) or (3) of the Act. In this regard, while the Board's general rule is that joint employers are liable for each other's unfair labor practices,[17] the Board did

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productivity and safety standards, even though the agreement specified that the supplier was the sole employer).

[15] *Id.*, slip op. at 16.

[16] We note that, while our prior memorandum contained arguments in support of finding joint-employer status based on "economic realities," this approach was expressly rejected by the Board in *BFI Newby Island Recyclery*. *Id.*, slip op. at 12-13 n.68. Therefore, the Region should not rely on such an analysis.

[17] *See, e.g., Ref-Chem Co.*, 169 NLRB 376 (1968), *enforcement denied on other grounds*, 418 F.2d 127 (5th Cir. 1969). In *Ref-Chem Co.*, the Board rejected a joint employer's Section 10(b) defense, explaining that a charge against one of the employers effectively constituted a charge against both of the employers, as "each is responsible for the conduct of the other and whatever unlawful practices are engaged in by the one must be deemed to have been committed by both." *Id.* at 380. The Board has repeatedly reaffirmed this principle of joint liability. *See, e.g., Whitewood Maintenance Co.*, 292 NLRB 1159, 1164 (1989) (joint employer liable for its co-employer's unlawful Section 8(a)(1) statements), *enforced*, 928 F.2d 1426 (5th Cir. 1991); *Mar del Plata Condominium*, 282 NLRB 1012, 1012 n.3 (1987) (joint employer liable for co-employer's unlawful Section 8(a)(3) discipline and 8(a)(1) statements); *Windemuller Electric*, 306 NLRB 664, 666 (1992) (joint employer liable for its co-

create a narrow exception to this general rule in *Capitol EMI Music*.[18] In *Capitol EMI Music*, the Board found that a staffing agency that referred a temporary employee to a recording products company was not liable for the latter company's unlawful termination of the temporary employee, despite the fact that the companies were joint employers, where the reasons given to the staffing agency for his removal made no mention of his union activity.[19]

In reaching this holding, the Board expressly noted that, where joint employers "perceive a mutual interest in warding off union representation from the jointly managed employees[,]" then "one joint employer, by its unlawful conduct, might reasonably be regarded as acting in the 'interest' of its co-employer by chilling the union activity of its employees."[20] In such a situation, the Board might prevent a "seemingly 'innocent' joint employer" from reaping the benefits of its co-employer's unlawful conduct "by holding that seemingly innocent joint employer vicariously liable."[21] Such is not the case, however, where one employer merely provides employees to its co-employer and takes no part in the daily direction or oversight of the employees and has no representatives present at the worksite, as was the case in *Capitol EMI Music*.[22] In those circumstances, the Board held, it would be unreasonable to automatically hold the labor supplier liable for the unlawful acts of its co-employer.[23] The Board emphasized in *Capitol EMI Music* that this new rule applies only to the type of joint employer relationships in which one employer supplies employees to work in another employer's business and to unfair labor practices dependent on findings of unlawful motive.[24]

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employer's 8(a)(1) violations and discriminatory 8(a)(3) layoffs), *enforced in relevant part*, 34 F.3d 384 (6th Cir. 1994); *Branch International Services*, 313 NLRB 1293, 1300 (1994) (co-employers jointly liable for staffing agency's refusal to remit check-off dues to union after staffing agency became party to collective-bargaining agreement).

[18] 311 NLRB 997 (1993), *enforced per curiam*, 23 F.3d 399 (4th Cir. 1994).

[19] *Id.* at 997-98.

[20] *Id.* at 999.

[21] *Id.*

[22] *Id.* at 1000.

[23] *Id.*

[24] *Id.* at 1001.

In the years since *Capitol EMI Music* issued, the Board has generally applied the rule announced in that case primarily in the context of labor supplier-user relationships[25] and only to unfair labor practices that turn on an unlawful motive. For example, in *D&F Industries*, the Board took care to distinguish the analysis regarding the labor supplier's alleged 8(a)(3) violations from that applied to its alleged 8(a)(1) violations.[26] Thus, the Board explained that the labor supplier was liable for the user's discriminatory actions under the *Capitol EMI Music* test, while it found the labor supplier liable for the user's coercive statements simply based on its joint employer status, citing to an earlier decision that relied on *Ref-Chem*.[27]

Moreover, the Board has clearly distinguished *Capitol EMI* and found joint liability in cases where the "nonacting" employer was not "innocent" and had an interest in preventing union representation of its co-employer's employees. For example, in *Mingo Logan Coal Co.*, involving a mining company and one of the mining company's on-site contractors, the Board upheld the ALJ's finding that *Capitol EMI Music* was "clearly distinguishable."[28] The ALJ had observed that the two employers perceived "a mutual interest in warding off union representation," and as such the contractor was not an "innocent" employer within the meaning of *Capitol EMI Music*.[29]

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[25] In the exceptional cases in which the Board has applied *Capitol EMI Music* outside of the context of a "user-supplier" joint employer relationship, it has nonetheless found joint liability for all of the unfair labor practices at issue. Thus, in *Le Rendezvous Restaurant*, 332 NLRB 336, 336-37 (2000), while the Board acknowledged that *Capitol EMI Music* had involved a "user-supplier" joint employer relationship, it used the analysis contained therein to find joint liability for a hotel and a separate company to which the hotel had subcontracted the operation of its restaurant. And, in *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op at 1 n.7 (May 17, 2016), the Board cited *Capitol EMI Music* in finding joint liability to be appropriate, also in the context of a subcontracting relationship.

[26] 339 NLRB 618, 618 n.2 (2003).

[27] *Id.* (citing *Windemuller Electric,* 306 NLRB at 666).

[28] 336 NLRB 83, 108 (2001), *enforced in relevant part*, 67 F. App'x 178 (4th Cir. 2003).

[29] *Id. See also Hobbs & Oberg Mining Co.*, 316 NLRB 542, 542 (1995) (in compliance proceeding, Board found order against two contractor joint employers for unlawful conduct of a third co-employer, a mining company, to be "consistent" with *Capitol EMI Music*, as all three were "engaged in an unlawful scheme to oust the [u]nion").

Here, of course, Icahn is not merely an uninterested supplier of employees to Trump, or the type of "innocent" employer to which the *Capitol EMI Music* analysis was intended to apply.[30] Unlike the staffing agency in *Capitol EMI Music*, which itself had no connection with the recording products company apart from leasing employees to it, Icahn is a substantial creditor and investor in Trump, publicly and privately involved in Trump's dealings with the Union, and highly likely to benefit from its joint employer's unlawful conduct. Thus, the exception set forth in *Capitol EMI Music* is inapplicable here, and Icahn should be held jointly liable for all of the unfair labor practices at issue.

This conclusion is consistent with long-standing Board law recognizing that a creditor can be a joint employer of a debtor's employees.[31] Thus, for example, in *Sussex*, the Board concluded that a principal creditor and source of working capital "in fact control[ed] the business and labor policies" of the debtor company, and therefore was a joint employer with the debtor company.[32] For all these reasons, we conclude that Icahn is a joint employer with Trump, also liable for all of the unfair labor practices at issue here.

The Region should seek (b) (5) [redacted]

(b) (5) [redacted]

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[30] *See Capitol EMI Music*, 311 NLRB at 999-1000.

[31] *See, e.g., Sussex Dye & Print Works, Inc.*, 34 NLRB 625, 629-33 (1941).

[32] *Id.* at 632-33.

[33] 200 NLRB 992, 992 n.3 (1972) (requiring that unfair labor practice issues arising from a common set of facts known to the General Counsel be consolidated and litigated in a single proceeding).

(b) (5) [redacted]

Accordingly, the Region should issue complaint, absent settlement, as to those meritorious allegations that were not affected by the bankruptcy court order, naming both of the joint employers as respondents. (b) (5) [redacted]

(b) (5) [redacted]

/s/
B.J.K.

ADV.04-CA-143464.Response.TrumpEntertainment.(b) (6), (b) [redacted]

cc: Contempt, Compliance, and Special Litigation Branch